

THE CREATION OF A GLOBAL COMPETITION REGIME. WHERE EXACTLY DO THE OBSTACLES LIE — PRACTICAL CO-OPERATION OR IDEOLOGICAL DIFFERENCES?

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SUMMARY

There has been considerable interest in the creation of a global competition regime in the WTO since its conception. It is an issue that has always emerged in the forum's agenda, and yet, more than ten years later, the international trading system has been unable to agree on a global competition framework. Notwithstanding the current agreement to hold any framework negotiations in abeyance to enable the Doha Round negotiations to proceed, two interesting conclusions can be drawn. First of all, that the agreement pertains only to negotiation related discussions and not discussions per-se on the issue of competition. This would mean that the work of the working group on competition will continue. Secondly, it demonstrates the importance of competition to both developing and developed members in the WTO, in that it has become a deciding factor on the furtherance of trade liberalization in the WTO. There are suggestions that the reasons for the lack of unanimous support in the WTO for its inclusion could be due to one of two reasons: practical co-operation or ideological differences. This article will establish that it is the disparity in development between member economies in the WTO that is the root of this failure. The paper will examine the various competition related issues that manifest as a result of this disparity in the context of suggestions by academics, regarding cooperation, ideological differences and harmonization of competition laws. This article will also examine work undertaken at various international fora and will demonstrate that the disparity in development is a common issue that cuts across the various suggestions offered in this regard, submitting that for reasons relating to membership and workability, the WTO has been the most successful in narrowing this gap. This article will discuss the possibility of a WTO competition framework based on elements identified by members in the Doha Ministerial Declaration and analyze submissions of members to the WTO Working Group. Notwithstanding the agreement on elements, the development disparity makes consensus

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on the scope of such elements difficult. This article will conclude that it is possible that most developing and some developed countries may not at the moment be prepared to take on a commitment on global competition, which would entail sacrificing autonomy over strategic trade policy and a degree of sovereignty respectively.

THE IMPORTANCE OF GLOBAL COMPETITION POLICY

Although some authors approach the need for a global competition regime from a consumer versus market access perspective,¹ it is submitted that the issue is one that will need to balance both these issues with the additional issues of efficiency and enhancing global welfare and development.² The importance of competition policy is said to be premised on the concept of perfect competition.³ Although this concept will not be examined here,⁴ it suffices to say that markets are imperfect, as businesses have a tendency to combine or make agreements that are profitable for them at the expense of overall welfare.⁵ Further, the role of public choice and strategic trade policy should not be discounted from the equation,⁶ although some authors ignore the impact of public choice when discussing the interaction between trade policy and competition policy.⁷

The main issue underlying the lack of achievement of a global consensus on competition is that it is seen as a solution to concerns arising from developments in the international trading system for both developed and developing countries. However, such solutions are approached from totally opposite directions. The process of globalization and trade liberalization has raised different concerns for these countries. For developing countries domestically, competition transcends purely economic considerations, effecting social policies and political choice.⁸ The need to maintain such domestic policies to enable preparation of domestic industries to compete globally is seen as a very important policy tool.⁹ For developed countries, competition is seen as a

¹ See Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 489 (2000).

² Edward Iacobucci, *The Interdependence of Trade and Competition Policies*, 21(2) WORLD COMPETITION 5, 6 (1997) (Belg.).

³ See SHANKARAN NAMBIAR, A MULTILATERAL COMPETITION FRAMEWORK IN THE WTO: A DEVELOPING COUNTRY PERSPECTIVE, MALAY. INST. OF ECON. RES. 1 (2002).

⁴ See generally D.G. GOYDER, EC COMPETITION LAW 10 (4th ed. 2003) (discussing the principle of perfect competition).

⁵ See ALISON JONES & BRENDA SUFRIN, EC COMPETITION LAW: TEXT, CASES, AND MATERIALS 4 (2001) (discussing perfect competition).

⁶ See Iacobucci, *supra* note 2.

⁷ See NAMBIAR, *supra* note 3, at 3; Iacobucci, *supra* note 2, at 12.

⁸ Iacobucci, *supra* note 2, at 6.

⁹ See NAMBIAR, *supra* note 3, at 4-5.

way of circumventing barriers erected by developing countries through strategic trade policies to enable their industries to reap the benefits of liberalized trade.

Recent trends in market systems of developing and socialist countries have made the issue of competition policy more prominent.¹⁰ The impact of private anti-competitive behavior supported by lax or non-existent competition policies in these countries create barriers that operate similarly to traditional trade barriers such as tariffs and quotas, previously dismantled through multilateral trade negotiations (particularly the WTO agreements). The undesirability of such a situation has two effects. Firstly, strategic trade policy and public choice reduces global welfare¹¹ and secondly, globalized business activities have led to concerns over increased multi-jurisdictional antitrust violations.¹² These have led to the utilization of unilateral measures to secure changes in behavior of businesses in another country,¹³ causing uncertainty due to the differing views of competition authorities and tensions resulting from unilateral measures between trading partners.¹⁴

The ability of anti-competitive practices to derail the development of international trade has long been appreciated.¹⁵ The WTO Agreement on Subsidies and Countervailing Measures seeks to check governmental interference in relation to world prices, through creating certainty and transparency in relation to governmental subsidies,¹⁶ and emphasizing the illegality of subsidies contingent on export performance.¹⁷ Although some claim that WTO initiatives only restrain governmental behavior,¹⁸ it is submitted that this is not entirely accurate, as the WTO Antidumping Agreement¹⁹ has, as its objective, the

¹⁰ *Id.*

¹¹ Iacobucci, *supra* note 2, at 6.

¹² Tohiaki Takigawa, *Harmonisation of Competition Law after Doha: Substantive and Procedural Harmonisation*, 36(3) J. WORLD TRADE 1111, 1111 (2002) (Neth.).

¹³ Aaditya Mattoo & Arvind Subramanian, *Multilateral Rules on Competition Policy: A Possible Way Forward*, 31(5) J. WORLD TRADE 95, 96 (1997) (Neth.); see also Peter A.G. van Bergeijk and Nico W. Mensink, *Measuring Globalization*, 31(3) J. WORLD TRADE 159, 159 (1997) (Neth.) (providing further elaboration).

¹⁴ See Iacobucci, *supra* note 2, at 13.

¹⁵ Mattoo & Subramanian, *supra* note 13, at 96.

¹⁶ See Agreement on Subsidies and Countervailing Measures art. I, Apr. 15, 1994 [hereinafter ASCM], available at http://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

¹⁷ ASCM art. 3.1(a).

¹⁸ Tarullo, *supra* note 1, at 479.

¹⁹ See generally Agreement on Implementation of Article VI of General Agreement of Tariffs and Trade 1994, available at http://www.wto.org/english/docs_e/legal_e/19-adp.pdf (displaying text of Antidumping Agreement in its entirety).

rectification of private anti-competitive behavior.²⁰ Resulting from these Agreements, developing countries encountered problems in "leveling the field of play" for their industries.²¹ The challenge for the international trading community, therefore, is to convey to developing countries: firstly, the positive impact of competition on welfare and why global welfare is important; secondly, a solution to concerns regarding strategic trade policy; and thirdly, that developing countries will not be marginalized from any process for a global competition regime.

COOPERATION

Practical Cooperation

There are two dimensions to cooperation. The first is bilateral co-operation between competition authorities, as suggested by the United States²² and supported by a number of authors.²³ This approach belies one of the major circumspections with which developing countries view global competition initiatives. Such an approach marginalizes developing countries, as many of them do not have competition laws.²⁴ Further, it is submitted that such an approach is seriously flawed, as it does not address competition at a global level. The weakness in such agreements can be seen from the problems faced during the Boeing/McDonnell Douglas merger, where the diverging approaches taken by United States and EU competition authorities made it impossible to reach a commonly acceptable solution.²⁵

This flaw raises two separate concerns for developing countries, firstly the application of domestic laws beyond borders,²⁶ and secondly, the disadvantage faced by the weaker country in such bilat-

²⁰ See Mervyn Martin, *Globalisation, Corporate Governance, and Competitiveness*, J. MALAY. INST. OF ACCT., Nov.-Dec. 2001, at 33; see also Gilbert R. Winham, *NAFTA Chapter 19 and the Development of International Administrative Law*, 32(1) J. WORLD TRADE 65, 65 (1998) (Neth.).

²¹ "Leveling the field of play" as opposed to "level playing field," is a term advocated by Dato' Jegadesan, former Deputy Director General of the Malaysian Industrial Development Authority (MIDA).

²² Olivier Cadot et al., *Trade and Competition Policy: Where Do We Stand?*, 34(3) J. WORLD TRADE 1, 12 (2000) (Neth.).

²³ Tarullo, *supra* note 1, at 499.

²⁴ Andrea Giardina & Americo Beviglia Zampetti, *Settling Competition-Related Disputes: The Arbitration Alternative in the WTO Framework*, 31(6) J. WORLD TRADE 5, 6 (1997) (Neth.).

²⁵ JONES & SUFRIN, *supra* note 5, at 1059; see also Phedon Nicolaides, *For a World Competition Authority*, 30(4) J. WORLD TRADE 131, 137 (1996) (Neth.) (citing eight examples of critical differences between U.S. antitrust law and EU competition law).

²⁶ JONES & SUFRIN, *supra* note 5, at 1059.

eral agreements. Some authors note that national authorities enforcing their own national provisions extraterritorially cannot guarantee the attainment of undistorted international trade.²⁷ This is because of three reasons. Firstly, it creates uncertainty within the international trading system; secondly, it strikes at the heart of the sovereignty of a nation, and thirdly, it is seen as unreasonable, or even as a type of protectionism, as in the case of the United States.²⁸ There are two dimensions to the issue of extraterritoriality. Firstly, notwithstanding some authors' assertion that United States and EU laws do not require their respective competition authorities to take into account non-competition considerations such as national interests,²⁹ it is submitted that in practice, they do. To substantiate this submission is the U.S. admission that its approval of the Boeing/McDonnell Douglas merger was based on its defense interests.³⁰ The compatibility of extraterritoriality in international law and the sovereignty of a nation are closely connected.³¹ Although the idea of the effects doctrine is receiving increasing acceptance in the context of competition related matters due to the transnational effects of anti-competitive practices,³² it is submitted that domestic policy objectives have no place in such an equation. Further, part of the criticisms of the EU's approach of the *Gencor* case³³ was that it disregarded the fact that the South African government considered and approved the merger, considering it to be good for its economy. The decision is viewed by some as a blatant disregard for South Africa's sovereignty.³⁴

The second issue in relation to bilateral cooperation agreements also stems from the *Gencor* case, where a comparison between the decision of the EU in this case and the Boeing/McDonnell Douglas merger caused some authors to question if the EU decision would be the same if South Africa was as powerful as the United States.³⁵ This concern will cause developing countries to doubt the feasibility of en-

²⁷ Nicolaides, *supra* note 25, at 137-38.

²⁸ See JONES & SUFRIN, *supra* note 5, at 1045 (discussing the treble damages provision of the Clayton Act and how U.K. statutes forbid the enforcement of treble damages in U.K. courts).

²⁹ Nicolaides, *supra* note 27, at 137.

³⁰ JONES & SUFRIN, *supra* note 5, at 1058.

³¹ See Vaughan Lowe, Jurisdiction, in INTERNATIONAL LAW 338-39 (Malcolm D. Evans, ed., 2003).

³² See Ernst-Ulrich Petersmann, *International Competition Rules for Governments and for Private Business: The Case for Linking Future WTO Negotiations on Investment, Competition, and Environmental Rules to Reforms of Anti-Dumping Laws*, 30(3) J. WORLD TRADE 5, 13 (1996) (Neth.).

³³ Case T-102/96, *Gencor Ltd. v. Comm'n*, 1999 E.C.R. II-753.

³⁴ See JONES & SUFRIN, *supra* note 5, at 1065.

³⁵ *Id.* at 1066.

tering into bilateral negotiations with developed countries. This point is, to an extent, substantiated by the fact that the current competition related bilateral cooperation agreements are predominantly between developed countries.³⁶

Technical Cooperation

The other dimension relating to cooperation is technical cooperation and competition advocacy. In an era where emphasis is placed on discussions for a global competition regime, it is submitted that many authors³⁷ discuss the possible means of achieving such a regime without paying sufficient cognizance to the fact that a significant number of developing countries have yet to adopt a competition law.³⁸ Where the issue encompasses a regime of a global nature, it is submitted that such a decision has to be taken by all stakeholders, including developing countries. However, these countries do not have sufficient experience with competition issues to approach such a task.³⁹ It is here that the issue of technical cooperation becomes important. There have been such endeavors on mainly three fronts. First of all, under the United Nations Conference on Trade and Development (UNCTAD),⁴⁰ the Organization for Economic Cooperation and Development (OECD),⁴¹ and the World Trade Organisation (WTO).⁴² It must be stressed that cooperation of this type will only be successful if there are positive efforts from both sides. Developing countries must participate actively and meaningfully in such exchanges to fully appre-

³⁶ MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 594 (3d ed. 2005).

³⁷ See Giardina & Zampetti, *supra* note 24, at 9.

³⁸ See TREBILCOCK & HOWSE, *supra* note 36, at 591 (stating that almost 50 WTO members have yet to enact a domestic competition law).

³⁹ Petros C. Mavroidis & Sally J. Van Siclen, *The Application of GATT/WTO Dispute Resolution System to Competition Issues*, 31(5) *WORLD TRADE* 1, 19 (1997); see also Martin, *supra* note 22, at 33 (inferring that the scope of such cooperation should not be limited to governmental institutions; there will be a need to educate the business sector, as in many developing countries, they have been operating without a competition-based culture for a long time).

⁴⁰ Through initiatives of its Intergovernmental Group of Expert Meeting on Competition Law and Policy produced a model law on Competition.

⁴¹ Which has been involved in the promotion of not only competition, through joint efforts with UNCTAD and World Bank, but also has been involved in outlining guidelines for the conduct of competition authority cooperation across national boundaries.

⁴² The First Ministerial Conference of the World Trade Organization (WTO) in 1996 established a working group to study the interaction between trade and competition to assist in capacity building for the possible development of a multilateral framework in competition policy.

ciate the importance of a competitive trading environment and its benefits to welfare enhancement, rather than using technical cooperation as a means for postponing or delaying binding commitments.

Ideological differences

The concerns pertaining to ideological differences create a range of issues. Firstly the use of strategic trade policy in furtherance of industrial, economic and socio-economic developmental objectives. The role of the state here, especially in East Asia has been overwhelmingly acknowledged.⁴³ It is also a policy tool utilized by most developing countries through private entities for resilience building as a result of the current trading environment. The regulation of private anti-competitive behavior will be seen as undermining the development process of these countries.

Connected to this issue is the concern of loss of sovereignty for governments in developing countries to decide and initiate development related initiatives. An important issue in the context of public choice and strategic trade policy is sovereignty. Some approach sovereignty separate from public choice and strategic trade policy.⁴⁴ It is submitted that the issue of sovereignty is the underlying issue in relation to the use of strategic trade policy and public choice, and that the three issues should not be considered separately. Governments must be accountable to the electorate and to an extent are responsible for the survival and success of their industries. Therefore they should be free to conduct the business of achieving such objectives within their borders. This issue is pertinent to both developed and developing countries; for instance, market-restructuring in the Malaysian banking sector in preparation for liberalization commitments,⁴⁵ and the use of competition policy to further the single market objective for the EU.⁴⁶

The political and social environment in developing countries is very different from developed countries. The impact of civil and political instability is much greater in developing countries when govern-

⁴³ Malaysian Institute of Economic Research (MIER), *Report on Study of Restrictive Business Practices and Their Effects on Malaysia's Competitive Dynamics* 22 (2003).

⁴⁴ See generally Iacobucci, *supra* note 2, at 5-28.

⁴⁵ Press Release, Bank Negara Malaysia (Central Bank of Malaysia), Domestic Banking Sector Consolidation Programme, (Oct. 21, 1999), available at http://www.mir.com.my/lb/econ_plan/contents/press_release/211099.htm.

⁴⁶ Treaty of Rome, arts. 2 and 3 (g) Mar. 25, 1957, 261 U.N.T.S. 140; see also VALENTINE KORAH, *EC COMPETITION LAW AND PRACTICE* 1-12 (7th ed. 2000); BARRY. RODGER & ANGUS. MACCULLOCH, *COMPETITION LAW AND POLICY IN THE EUROPEAN COMMUNITY AND UNITED KINGDOM* 16-22 (2d ed., 2001).

ments are seen to have failed in these objectives.⁴⁷ Another issue relating to strategic trade policy and sovereignty is that the developing country growth trajectory is different from that of developed countries, and, therefore, their concerns over the sovereignty of their trade policy are not impossible to understand.⁴⁸ Developing countries still feel the need for governmental intervention for certain areas of economic activity, especially where liberalization could seriously disadvantage certain local industries.⁴⁹ Also connected to this issue is public choice, where although not as plausible a tool of the two, is an element that should not be underemphasized due to its direct consequence on the competitive process, implications on efficiency and prevalence in both developed and developing countries.

HARMONIZATION

There have been many proposals attempting to offer a solution to the issue of regulating competition at the international level. Amongst these is the harmonization of competition laws.⁵⁰ Again, the marginalisation of developing countries not having a domestic competition law is the primary concern for the viability of this proposal. Many issues relating to this have been discussed above. However, it must be added that there would be further difficulties in relation to harmonization, stemming mainly from the diverging approaches major competition systems take.⁵¹ The interest in harmonization is said to be fostered by two developments: globalization and regionalism.⁵² The issue of globalization in this context has been discussed above, however, it is submitted that again, in the context of regionalism, the participation of developing countries is marginalized as developing country regional forums like the Association of South East Asian Nations, there are no discussions relating to a regional competition policy.⁵³ Assum-

⁴⁷ An example of this is the civil unrest that eventually shifted from dissatisfaction with the Indonesian government's handling of the Asian financial crisis in 1997, to racial attacks based on the contention of unequal distribution of wealth between races in the country.

⁴⁸ NAMBIAR, *supra* note 3, at 21.

⁴⁹ *Id.* at 5.

⁵⁰ Takigawa, *supra* note 12, at 1113-14; Matoo & Subramanian, *supra* note 15, at 96 (suggesting that this can be achieved, modeled after the harmonization exercise undertaken for the WTO Trade Related Intellectual Property Rights Agreement 1994).

⁵¹ Michael J. Trebilcock, *Competition Policy and Trade Policy - Mediating the Interface*, 30(4) J. WORLD TRADE 72 (1996).

⁵² Cadot, *supra* note 22, at 1.

⁵³ See Asean Annual Report 2002-2003, Ch. 2 *Economic Integration and Cooperation*, available at <http://www.aseansec.org/viewpdf.asp?file=ar03/pdf/chapter2.pdf>.

ing that harmonization is the chosen route for a global competition regime, such a regime would be heavily influenced not only by countries already with a competition regime, but, by the more influential of them. If we consider United States and EU the most influential, then it is fair to assume that these countries would influence such a harmonization process. However, international competition rules will need to focus on protecting competition and global welfare enhancement. Some authors have stressed that to achieve this through harmonization may be sub-optimal.⁵⁴ This is because, taking the United States for example, its regime does not seek to eliminate export cartels, which will impact on welfare outside its borders.⁵⁵ This has led developing countries to view such harmonization endeavors as a form of protectionist "beggar thy neighbour" policies and an intrusion on political sovereignty.⁵⁶ Another criticism of a U.S.-type influenced harmonization initiative, is that market imperfection rectification should be carried out at the exporters end.⁵⁷ Supporting this criticism are other authors' assertions that the adverse impact of higher prices associated with export related imperfection would eventually impact on the exporting country,⁵⁸ leading to overall welfare loss as a result. It is submitted that influential countries with such imperfection will need to address them, as it might not only undermine the competition advocacy initiatives they have undertaken, but would also serve to escalate the circumsppection of developing countries that a global competition regime would only serve to enhance the welfare in developed countries. Indeed the ambiguity of laws relating to vertical restraints in the EU, United States and Japan⁵⁹ can easily be mistaken as being strategically ambiguous for protectionist objectives. Further, as treaties seldom define the meaning of international public good, one author stated that such ambiguity has been strategically used by some countries through unilateral claims that rules of other countries are unfairly endangering international public good.⁶⁰ Other authors claim that harmonization is also unadvisable as it would be difficult to modify rules later, to accommodate developments in technology, organization of firms and the understanding of markets.⁶¹ Some authors claim that harmonization should focus on the interpretation and application and not the wordings contained in the various competition regimes. This, it is submit-

⁵⁴ Cadot, *supra* note 22, at 14.

⁵⁵ TREBILCOCK & HOWSE, *supra* note 36, at 475.

⁵⁶ Trebilcock, *supra* note 51, at 81.

⁵⁷ Clarisse Morgan, *Competition Policy and Anti-Dumping-Is it Time for a Reality Check*, 30(5) J. WORLD TRADE 62-65 (1996).

⁵⁸ Trebilcock, *supra* note 51, at 77.

⁵⁹ Takigawa, *supra* note 12, at 1114.

⁶⁰ Trebilcock, *supra* note 51, at 84.

⁶¹ Mavroidis & Van Siclen, *supra* note 39, at 18.

ted, would lend towards making harmonization more operational. However, as discussed above, especially in the case of the Boeing/McDonnell Douglas merger, the inclusion of national priorities would cause divergence in how any country views a particular issue.⁶²

INTERNATIONAL FORUMS

The issues relating to the disparity in development discussed above reflect the problems regarding consensus, based on views of academic writers. An examination of the various opinions and proposals forwarded in relation to the forum for negotiating a global regime, and the variance in perceptions by countries further reflect this disparity.

The International Competition Network (ICN)

The ICN was established based on a United States recommendation and adopted by the major competition enforcement authorities.⁶³ Based on its philosophy, it is a good initiative for capacity building and networking. The weakness of this forum to spearhead a global competition framework is based on the prerequisite of a country having dedicated competition legislation for membership.⁶⁴ This severely frustrates its capability for satisfying global capacity building requirements, especially where it is most necessary, with countries not having a competition law. Flowing from this criticism is the probability that it will be dominated by developed country participation and influence, which would compromise the participation of developing countries, and would in turn lead to their marginalization. Further, it is submitted, that the lack of trade related thinking in its deliberations⁶⁵ will make it a weak forum as the push for a global competition regime is in pursuance of checking global anti-competitive trade related practices.

UNCTAD

In 1980, the United Nations General Assembly adopted "The UN set,"⁶⁶ which has been reviewed four times since and was reaf-

⁶² See Cadot, *supra* note 22, at 14.

⁶³ See Julian Clarke & Simon J. Evenett, A Multilateral Framework for Competition Policy, in *THE SINGAPORE ISSUES AND THE WORLD TRADING SYSTEM: THE ROAD TO CANCUN AND BEYOND* 24 (Simon J. Evenett, ed., 2003).

⁶⁴ *Id.* at 41.

⁶⁵ See *id.* at 24.

⁶⁶ United Nations Conference on Restrictive Business Practices, Nov. 19-Dec. 8, 1979, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc A/C.2/35/6, annex. (Apr. 22, 1980).

firmed in 2000.⁶⁷ The problem with using UNCTAD as a forum for global competition is that the UN set is a non-binding statement of principles.⁶⁸ UNCTAD is seen as a forum for discussion and cooperation rather than an opportunity for nations to undertake binding negotiations.⁶⁹ Additionally, the Model Law on Competition specifically states that it takes into account widely adopted competition legislation. This indicates that it does not specifically address the concerns of developing countries.

OECD

OECD has been working on competition-related issues since 1967.⁷⁰ It has been criticized for failing to ensure minimum standards of global competition law enforcement.⁷¹ Logically, the focus of OECD's work will be on issues concerning developed countries. OECD simply fails to address the gap between the interests of developed countries and those of developing countries. It also fails to pacify the circumspection that developing countries have regarding the intentions of initiatives led by developed countries. It has also been criticized for its degree of divergence between members within the OECD on certain issues.⁷²

Although there has been a strong push for the OECD to be a host forum,⁷³ potential flaws arising from the lack of enforceability, such as the tendency of nations to place their own interests above complying with non-binding commitments, make a global initiative unrealistic.⁷⁴

WTO

Work on a multilateral framework on competition commenced in 1997. The main advantage of the WTO is that, notwithstanding the fact that competitive initiatives are led by developed countries, devel-

⁶⁷ See United Nations Conference on Trade and Development, *Draft Commentaries to Possible Elements for Articles of a Model Law or Laws*, U.N. Doc TD/B/RBP/81/Rev.5 (Feb. 20, 1998).

⁶⁸ Morgan, *supra* note 57, at 89.

⁶⁹ NAMBIAR, *supra* note 3, at 16.

⁷⁰ Clarke & Evenett, *supra* note 63, at 26.

⁷¹ *Id.* at 27.

⁷² See, e.g., Giardina & Zampetti, *supra* note 24, at 9-10 (describing the collapse of the OECD Multilateral Agreement on Investment (MAI) after its members failed to agree on the parameters of such an agreement).

⁷³ Tarullo, *supra* note 1, at 494-99.

⁷⁴ See EDWARD MONTGOMERY GRAHAM, *GLOBAL CORPORATIONS AND NATIONAL GOVERNMENTS: POSTWAR EFFORTS AT RULE MAKING* 77 (1996).

oping countries are not excluded from participating.⁷⁵ The forum is of a global nature where developing countries have demonstrated their interest in participation, although there are still differing interests among members. Notwithstanding the fact that some developing countries lack competition laws, the tone of members, particularly those originally opposed to expanding the WTO competition initiative, have gradually changed and resisting countries currently provide input into possible elements, modalities, and parameters for a multilateral framework.⁷⁶ This is largely a result of greater understanding of the benefits of competition, which has been created through technical cooperation at different levels, both within and outside of the WTO.⁷⁷

The Working Group focuses on anti-competitive practices that disrupt trade practices and undermine the benefits of trade liberalization.⁷⁸ Such a focus captures the attention of any WTO member. The initiatives in the WTO have not discussed the issue of harmonization, recognizing that one size does not fit all.⁷⁹

At the Doha Ministerial Conference in 2001, members decided to continue negotiations, based on consensus at the Cancun Ministerial Conference in 2003.⁸⁰ The text of the Doha Ministerial Declaration provides insight into the development of a global competition regime, by stating that technical assistance towards this end would include the UNCTAD⁸¹ and indicating the need to utilize neutral forums in the context of the developing/developed country divide. The Declaration identified elements that should be incorporated into a multilateral framework on competition.⁸² These elements, namely transparency, non-discrimination, and procedural fairness, contain all the tenants of the WTO, which members have already agreed upon.⁸³ Additionally, the Doha Ministerial Declaration includes provisions regarding cartels and modalities, as well as flexible special and differential (S&D) treatment for developing countries. An examination of these elements in the context of member submissions indicates that, notwithstanding the narrowing of the gap, there are still challenges regarding the parameters of these elements.

⁷⁵ World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC/ 36 I.L.M. 218 (1997).

⁷⁶ India is an example.

⁷⁷ World Trade Organization, *Annual Report 2002-2003*, at 53.

⁷⁸ Clarke & Evenett, *supra* note 63, at 28.

⁷⁹ *Id.*

⁸⁰ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration].

⁸¹ *Id.* at ¶ 24.

⁸² *Id.* at ¶ 25.

⁸³ Because the Doha Ministerial Declaration is a commonly accepted text, it is presumed that there is a general consensus on these elements.

Transparency

Member viewpoints on transparency fall into three major groups.⁸⁴ The first group is supportive of such provisions, recognizing the importance of ensuring that the laws, regulations, and guidelines of general application be made publicly available, while considering the need for S&D through progressive introduction of these laws by developing countries.⁸⁵ The second group is more cautious, stressing the need to identify the scope of transparency.⁸⁶ The third group advocates flexibility, arguing that developing countries should not be expected to adhere to the same standards of transparency as those of developed countries.⁸⁷

While there is general agreement on the need for S&D, the degree of this flexibility is uncertain. Does flexibility imply that transparency standards cannot be uniform across all nations? Would progressive introduction result in attaining similar standards between all members?⁸⁸ Some have argued that Singapore and Hong Kong were able to succeed based on their liberal trade policies, thereby guaranteeing that their markets remain open.⁸⁹ Other have postured that policies promoting competition measures prove that competition can

⁸⁴ Clarke & Evenett, *supra* note 63, at 29.

⁸⁵ See Submission of the European Community, *European Community – Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation*, WT/WGTCP/W/222 (Nov. 19 2002); see also Submission of Canada, *Canada–Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation*, WT/WGTCP/W/226 (Mar. 2, 2003).

⁸⁶ Submission of Hong Kong, *Hong Kong–Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation*, WT/WGTCP/W/224 (Mar. 5, 2003).

⁸⁷ Submission of China, *China–Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation*, WT/WGTCP/W/227 (Mar. 14, 2003); Submission of India, *India–Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation*, WT/WGTCP/W/215 (Sept. 26, 2002); Submission of Thailand, *Thailand–Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation*, WT/WGTCP/W/213 (Sept. 24, 2002).

⁸⁸ These issues caused Hong Kong to require identification of scope to create transparency. Generally, developing countries use government procurement procedures extensively in the pursuance of socio-economic developmental policies. The unavailability of this avenue through a multilateral framework on competition requiring transparency may cause domestic problems. The difficulty in moving the work program for an agreement on transparency in the WTO is an indication of the discomfort of developing countries.

⁸⁹ See, e.g., Petersmann, *supra* note 32, at 12 (stating that these economies do not have competition laws).

be ensured through industrial and trade policies.⁹⁰ If the latter argument were accepted, the entire need for a global framework becomes redundant. This approach does not consider public choice, nor does it contemplate repercussions in an international context. Accordingly, the issue of transparency in relation to domestic competition is essential in guaranteeing the success of the other core principles identified.

Non-discrimination

Non-discrimination in the context of a WTO agreement involves two elements: the most favored nation and national treatment principles.⁹¹ In defining these elements, some seek to limit them to *de jure* discrimination in the context of national competition laws, rather than a *de facto* discrimination.⁹² Others go further to state that *de facto* type obligations would cause complications in relation to enforcement policies, priorities, and prosecutorial discretion, including the application of competition law to individual cases.⁹³ Some members have indicated a need for a system of exemptions built into the framework, recognizing the necessity for contingencies regarding national interests.⁹⁴ For example, Japan was interested in allowing bilateral agreements to have precedence over multilateral agreements where there were conflicts.⁹⁵ Developing countries have predominantly voiced the need for S&D,⁹⁶ stressing that such a framework should include export cartels for developed countries, but not for developing countries, as their firms needed to band together to contrast the bargaining power of multinational enterprises of developed countries.⁹⁷

⁹⁰ See Pradeep S. Metha, *Competition Policy in Developing Countries: An Asia Pacific Perspective*, BULL. ASIA-PACIFIC PERSPECTIVES, at 80-81 (2002-03).

⁹¹ Clarke & Evenett, *supra* note 63, at 30.

⁹² Submission of Korea, *Korea-Core Principles of Competition*, WT/WGTCP/W/212 (Sept. 24, 2002), available at http://docsonline.wto.org/gen_home.asp?language=1&_1.

⁹³ Submission of the European Community, *European Community-Investment, Competition Policy, Transparency in Government Procurement and Trade Facilitation*, WT/WGTCP/W/222 (Nov. 19, 2002).

⁹⁴ Submission of Australia, *Australia-Core Principles, Including Transparency, Non-discrimination and Procedural Fairness*, WT/WGTCP/W/211 (Sept. 24, 2002), available at http://docsonline.wto.org/gen_home.asp?language=1&_1.

⁹⁵ Submission of Japan, *Japan-Core Principles*, WT/WGTCP/W/217 (Sept. 26, 2002), available at http://docsonline.wto.org/gen_home.asp?language=1&_1.

⁹⁶ Submission of India, *India-Non-discrimination in the Context of Competition Policy: National Treatment*, WT/WGTCP/W/216 (Sept. 26, 2003), available at http://docsonline.wto.org/gen_home.asp?language=1&_1; Submission of Thailand, *Thailand-Core Principles*, WT/WGTCP/W/213 (Sept. 26, 2002).

⁹⁷ Bernard Hoekman, *Competition Policy and the Global Trading System: A Developing Country Perspective*, THE WORLD BANK, March 1997, available at <http://>

There are several problems in reaching a consensus in this area. First of all, there are connotations behind the regulation of export cartels, as it is a sensitive political area for the United States. It is also an indication from developed countries that competition proponents should "do as they say," rather than advocate competition policies to developing countries while maintaining anti-competitive policies. The second issue is that the limitation to *de jure* discrimination, although having its merits, can be viewed as a method of maintaining some kind of control over enforcement, as the United States and European Union currently do. An example is the *Aluminum International Cartel* case, where the EU chose not to prosecute a cartel although it had jurisdiction to do so under EU competition law, probably due to political affiliations.⁹⁸ Such a situation also has the potential to retard positive comity.

This situation is amplified by the Japanese concern that previous bilateral agreements should be given priority over multilateral obligations. This concern may be a stumbling block to the multilateral process. Bilateral and regional agreements should complement, rather than undermine, multilateral initiatives.⁹⁹ Such issues may act to drive developed and developing countries apart, rather than narrowing the gap between them.

Procedural Fairness

According to the WTO secretariat, there is convergence on four issues of procedural fairness: the right to notice of investigation, the right to a defense, the right of judicial review, and the need to protect confidential information, including business secrets.¹⁰⁰ Developing countries have been cautious in this arena, stressing on the need for S&D regarding the gradual phase-in of such obligations.¹⁰¹ China went even further than other countries, stating that such procedural systems should reflect a member's level of development. After the transition period for implementation, members' standard of procedural fairness should not be allowed to vary, as this would lead to inherent

ideas.repec.org/p/wbk/wbrwps/1735.html (stating that banning export cartels is beneficial to developing countries).

⁹⁸ See Frederic Jenny, *Competition Law and Policy: Global Governance Issues*, 26 WORLD COMPETITION L. & ECON. REV. 609, 611-14 (2003).

⁹⁹ See ROBERT SCOLLAY & JOHN GILBERT, NEW REGIONAL TRADING AGREEMENTS IN THE ASIA PACIFIC? 10 (2001).

¹⁰⁰ Annual Report of the Working Group 2002, WT/WGTCP/6 (Dec. 9, 2002), available at http://docsonline.wto.org/gen_home.asp?language=1&_1=1.

¹⁰¹ Submission of China, *China—Elements Contained in Paragraph 25 of the Doha Ministerial Declaration* WT/WGTCP/W/227 (Mar. 14, 2003), available at http://docsonline.wto.org/gen_home.asp?language=1&_1=1; Submission of Thailand, *Thailand—Core Principles*, WT/WGTCP/W/213 (Sept. 26, 2002).

injustice to both developed and developing members, as well as discourage developing countries to strive for improvement if no benchmark is set. This is very different from the recognition that implementation may be different due to the differing legal traditions of members.¹⁰²

Hard-core Cartels

Other than Thailand's argument on export cartels and discussion on political affiliations between developed countries, an interesting comment about the EC submission on hard-core cartels is that it was not prepared to take a stand on whether export cartels should be included in the definition of hard-core cartels.¹⁰³ This is a position taken by the OECD in general.¹⁰⁴

Modalities for Voluntary Cooperation

According to the WTO secretariat, four tools were identified for voluntary cooperation based on bilateral competition agreements. As discussed earlier, developing countries were marginalized in relation to such agreements, as reflected by opinions among member nations. While it is generally accepted that a competition policy committee should be established, developed members see it only being necessary for facilitating exchange of ideas and experience,¹⁰⁵ while developing countries require a more formal function for the committee.¹⁰⁶ Due to lack of cooperation in the past, developing countries are concerned that they will be targeted by industries of developed countries.¹⁰⁷ A related issue is the criticism that the WTO Dispute Settlement Mechanism

¹⁰² See Submission of Canada, *Canada-Possible Elements of a Multilateral Framework for Competition*, WT/WGTCP/W/226 (Mar. 12, 2003), available at http://docsonline.wto.org/gen_home.asp?language=1&_1=1.

¹⁰³ Clarke & Evenett, *supra* note 63, at 36; Framework Agreement on Competition, *European Communities-International Hard Core Cartels and Cooperation under a WTO*, WT/WGTCP/W/193 (July 1, 2002), available at http://docsonline.wto.org/gen_home.asp?language=1&_1=1.

¹⁰⁴ See OECD Joint Forum on Trade and Competition, *Issues for Trade and Competition in the Global Context: A Synthesis*, at 12.

¹⁰⁵ Submission of Canada, *Canada-Towards a Flexible Framework for Cooperation*, WT/WGTCP/W/202 (Aug. 12, 2002), available at http://docsonline.wto.org/gen_home.asp?language=1&_1=1.

¹⁰⁶ Submission of Thailand, *Thailand-International Cooperation in Competition Policy*, WT/WGTCP/W/205 (Aug. 15, 2002), available at http://docsonline.wto.org/gen_home.asp?language=1&_1=1.

¹⁰⁷ Clarke & Evenett, *supra* note 63, at 37. Such concerns are not unreasonable as developing countries experienced similar targeting during the initial years after the WTO anti-dumping regime was introduced.

lacks the technical competence to handle competition cases.¹⁰⁸ This issue should be viewed from two angles: building the requisite competence within the WTO by employing qualified staff, and ensuring that capacity building is undertaken in developing countries.¹⁰⁹ Another acceptable standard of competence must be achieved before any binding obligations are undertaken. Other dispute settlement issues, such as public access to dispute procedures and issues of efficiency vis-à-vis non-discrimination, should be addressed after the competence issue is settled.¹¹⁰

S&D

Developing countries have made a number of varying arguments relating to S&D. One argument in particular stresses that S&D should be a core principle in the WTO framework.¹¹¹ This reflects the cautiousness of developing countries in entering into binding obligations and has been an issue on the agenda of developing countries in almost every aspect of WTO business.

CONCLUSION

The main obstacle to attaining consensus for a global competition regime is the differing level of development between developed and developing countries. An analysis of the contradictory views expressed by competition writers and those of WTO members indicates that these contradictions stem from the differing needs of these countries based on the different dimensions of development and subsequent objectives of overall governmental policies. This view has been recognized by the WTO secretariat when commenting that the need for exemptions expressed by both sides is due to the diversity between members.¹¹² Technical cooperation has gone a long way in narrowing these differences, leading to the recognition that such a framework should preserve a "policy space" for developing countries to pursue economic and social policies for development.¹¹³ Additionally, there has been a shift in perspective of developing countries that initially opposed any regulation of international competition. The main concerns of developing countries are the loss of a very important policy tool

¹⁰⁸ NAMBIAR, *supra* note 3, at 22.

¹⁰⁹ This would mean expanding the secretariat, therefore increasing contributions from developed countries that see the benefits of global welfare.

¹¹⁰ Giardina & Zampetti, *supra* note 24.

¹¹¹ Submission of Thailand, *Thailand-Core Principles*, WT/WGTCP/W/213 (Sept. 26, 2002).

¹¹² Annual Report of the Working Group 2002, WT/WGTCP/6 (Dec. 9, 2002), available at http://docsonline.wto.org/gen_home.asp?language=1&_=1.

¹¹³ *Id.*

through national treatment obligations and an under-appreciation of their needs resulting from marginalization from standard setting initiatives to date.

Some critics have suggested using foreign investment laws to circumvent national treatment obligations regarding merger reviews for different treatment of domestic and foreign company mergers to attain industrial policy objectives.¹¹⁴ This view fails to take into account other issues recently discussed at the WTO, including the possible multilateral framework on investment that may increase caution among developing nations. One may question whether developed countries are even ready for a regime of global magnitude, due to the level of transparency that is required for an international initiative. Such an initiative requires compromise among all members, even the most powerful.¹¹⁵

Current discussion of competition within the WTO is the most advanced its ever been. Its existing mechanisms and membership makes it the most viable institution for pursuing a global framework. However, due to the working process in the WTO,¹¹⁶ and the uncertainty of whether influential nations will compromise, explicit consensus will not likely be reached in the near future.

¹¹⁴ Clarke & Evenett, *supra* note 63, at 41.

¹¹⁵ Maher M. Debbah, *Measuring the Success of a System of Competition Law: A Preliminary View*, 21 EUR. COMP. L. REV. 369 (2000).

¹¹⁶ The working process for drafting a framework entails a study of all existing member laws.